Supreme Court, U.S.
FILED
JUL 23 1997
CLERK

(3)

No. 96-1647

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

EDGAR ROMNEY, Manager-Secretary, Blouse, Skirt, Sportswear, Children's Wear & Allied Workers Union, Local 23-25, ILGWU,

Petitioner,

vs.

ALAN LIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER J. SULLIVAN
Counsel of Record
MARA B. LEVIN
HERRICK, FEINSTEIN LLP
Attorneys for Respondent Alan Lin
Two Park Avenue
New York, New York 10016
(212) 592-1400

On the Brief:
MARA B. LEVIN

16 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
REASONS FOR DENYING THE WRIT	1
I. NO CONFLICT IS PRESENTED AMONG THE RECENT PREEMPTION CASES OF THIS COURT AND THE SECOND CIRCUIT'S DECISION	2
II. WITH THE BENEFIT OF *DILLINGHAM*, THE SECOND CIRCUIT'S DECISION WOULD REMAIN UNDISTURBED	7
III. THE SECOND CIRCUIT PROPERLY CONCLUDED THAT THE STATE LAW ACTION AT ISSUE FELL "WITHIN THE SCOPE" OF § 502(a) AND THAT REMOVAL WAS PROPER	9
CONCLUSION	11

TABLE OF AUTHORITIES

Cases:	Page
California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., 117 S.Ct. 832 (1997).	2, 4, 7, 8
District of Columbia v. Greater Washington Board of Trade, 506 U.S. 125 (1992)	7, 8
FMC Corp. v. Holliday, 498 U.S. 52 (1990)	3
Greenblatt v. Delta Plumbing & Heating Corp., 68 F.3d 561 (2d Cir. 1995)	4, 5
Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990).	1-4, 8, 9
Local Union 598 Plumbers & Pipefitters Industry Journeymen & Apprentices Training Fund v. J.A. Jones Construction Co., 846 F.2d 1213 (9th Cir.), *aff'd*, 488 U.S. 881 (1988)	3
Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825 (1988)	7
McCoy v. Massachusetts Institute of Technology, 950 F.2d 13 (1st Cir. 1991), *cert. denied*, 504 U.S. 910 (1992)	3
Metropolitan Life Insurance Co v. Taylor, 481 U.S. 58 (1987)	10
New York Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co., 514 U.S. 645 (1995)	1, 4
Peacock v. Thomas, 116 S.Ct. 862 (1996)	2, 9
Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987)	5, 9
Ragan v. Tri-County Excavating, 62 F.3d 501 (3d Cir. 1995)	5, 6
Rebaldo v. Cuomo, 749 F.2d 133 (2d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985)	3

Cases:	Page
Smith v. Dunham-Bush, Inc., 959 F.2d 6 (2d Cir. 1992) ..	3
Travelers Ins. Co. v. Cuomo, 14 F.3d 708 (2d Cir. 1993), *rev'd on other grounds, sub nom., New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995)	3
State Cases:	
Board of Trustees of Operating Engineers Local 825 Fund Service Facilities v. First Indemnity of America Ins. Co., 287 N.J. Super. 498, 671 A.2d 596 (App. Div. 1996).....	4
Board of Trustees of Operating Engineers Local 825 Fund Service Facilities v. First Indemnity of America Ins. Co., 148 N.J. 561, 691 A.2d 339 (1997)	4, 5
Hawaii Laborers Trust Funds v. Maui Prince Hotel, 81 Haw. 487, 918 P.2d 1143 (1996).....	6
Morgan Guaranty Trust Co. v. Tax Appeals Tribunal of Department of Taxation and Finance, 80 N.Y.2d 44, 599 N.E.2d 656 (1992).....	3
Sasso v. Vachris, 66 N.Y.2d 28, 484 N.E.2d 1359 (1985)	1-3
Seaboard Surety Co. v. Indiana State District Council of Laborers and Hod Carriers Health and Welfare Fund, 645 N.E.2d 1121 (Ind. Ct. App. 1995).....	5, 6

	Page
Federal Statutes:	
Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq*.....	*passim*
§ 502(a), 29 U.S.C. § 1132(a).....	*passim*
§ 514, 29 U.S.C. § 1144.....	*passim*
§ 515, 29 U.S.C. § 1145.....	*passim*
State Statutues:	
New York Business Corporation Law (BCL) § 630.....	*passim*

RESPONDENT ALAN LIN'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Alan Lin requests that this Court deny the petition of Edgar Romney, as Manager-Secretary of the Blouse, Skirt, Sportswear, Children's Wear & Allied Workers' Union Local 23-25, Union of Needletrades, Industrial and Textile Employees, for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Second Circuit entered on August 27, 1996.

REASONS FOR DENYING THE WRIT

Petitioner has asserted three bases for his contention that this Court should review the Second Circuit's finding that Section 630 of New York's Business Corporation Law ("BCL"), which provides alternate enforcement mechanisms to collect delinquent contributions that the employer has not paid, is preempted by the Employee Retirement Income Security Act of 1974, as amended ("ERISA").[1]

First, Petitioner contends that the Second Circuit's decision conflicts with the New York Court of Appeals' 1985 decision in *Sasso v. Vachris*, 66 N.Y.2d 28, 484 N.E.2d 1359 (1985), and departs from a purported trend following this Court's decision in *New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995), toward a more narrow definition of which state laws "relate to" employee benefit plans within the meaning of ERISA § 514, 29 U.S.C. § 1144. (Pet. at 10-16.) In so contending, Petitioner admonishes the Second Circuit for having relied on this Court's decision in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990), rather than on the legislative history of ERISA § 515, 29 U.S.C. § 1145. (Pet. at 12.)

Second, Petitioner contends that the Second Circuit's preemption analysis and its conclusion that BCL § 630 impermissibly

---

[1] The Second Circuit's decision is reported at 94 F.3d 74, Pet. App. 1a-17a, and the decision denying the petition for rehearing is reported at 105 F.3d 806, Pet. App. 24a-39a.

references ERISA plans cannot be squared with this Court's recent decision in *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A.*, 117 S.Ct. 832 (1997), decided after the Court of Appeals completed its consideration of the case before this Court. (Pet. at 16-18.)

Lastly, relying on this Court's decision in *Peacock v. Thomas*, 116 S.Ct. 862 (1996), Petitioner claims that this action was not properly removed since, contrary to the Second Circuit's holding, the state law action does not fall "within the scope" of ERISA § 502(a), 29 U.S.C. § 1132(a), a prerequisite to a finding that removable is proper. According to Petitioner, the legislative history behind the enactment of ERISA § 515, which he contends evidences a specific intention by Congress not to create exclusive federal remedies in actions for benefits, more properly governs whether Petitioner's action falls "within the scope" of ERISA § 502(a). (Pet. at 18-20.)

I.

NO CONFLICT IS PRESENTED AMONG THE RECENT PREEMPTION CASES OF THIS COURT AND THE SECOND CIRCUIT'S DECISION

Ignoring the fact that the Second Circuit's decision is entirely consistent with the recent preemption decisions of this Court, Petitioner contends that the writ should be granted because the decision at issue conflicts with a 1985 New York Court of Appeals decision and several state court decisions. To this end, Petitioner argues that the Second Circuit's determination that the analysis applied by New York State's Court of Appeals in *Sasso v. Vachris*, 66 N.Y.2d 28, 484 N.E.2d 1359 (1985), was foreclosed by this Court's decision in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1980) is contrary to the legislative history of ERISA § 515. In so doing, Petitioner misinterprets the true basis for the *Vachris* court's now-misplaced finding that BCL § 630 was not preempted by ERISA. (Pet. at 11-12.)

In addressing the ERISA preemption issue, the New York State court considered the narrow issue of whether § 630 impermissibly "relates to" the ERISA-covered employee benefit plan within the

meaning of ERISA § 514(a). Concluding that it did not, the *Vachris* court relied on the now repudiated reasoning of the Second Circuit in *Rebaldo v. Cuomo*, 749 F.2d 133, 137 (2d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985), which dictated that only state laws which "purport to regulate...the terms and conditions" of an ERISA plan are preempted. Based on that standard, the *Vachris* court reasoned that BCL § 630 did not purport to regulate the terms or conditions of the plan, but rather was merely an "enforcement mechanism" to collect money owed to the corporation. 66 N.Y.2d at 33.

However, in *Smith v. Dunham-Bush, Inc.*, 959 F.2d 6 (2d Cir. 1992) and *Travelers Ins. Co. v. Cuomo*, 14 F.3d 708 (2d Cir. 1993, *rev'd on other grounds, sub nom., New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995), the Second Circuit held that any further reliance on the "purport to regulate" standard adopted in *Rebaldo* (upon which the *Vachris* decision was based) was misplaced in view of the Supreme Court's rejection of that standard in *Ingersoll-Rand*. (Pet. App. 13a-14a.)[2]

Contrary to Petitioner's contention, the Second Circuit did not ignore the legislative history of § 515, but in fact acknowledged the *Vachris* court's review of that history and then concluded that this Court in *Ingersoll-Rand* "made clear that state statutes that augment ERISA remedies are preempted, as well as state statutes that impair ERISA remedies." (Pet. App. 14a.) Relying on *Ingersoll-Rand*, which did not distinguish between state law causes of action which

---

[2] Indeed, even New York's Court of Appeals acknowledged in *Morgan Guaranty Trust Co. v. Tax Appeals Tribunal of Dept. of Taxation and Finance*, 80 N.Y.2d 44, 599 N.E.2d 656 (1992), that "[t]wo recent preemption cases, *Ingersoll-Rand* and *FMC Corp.[v. Holliday*, 498 U.S. 52 (1990)], have put to rest the contention that only laws relating to the terms, conditions or administration of a plan are preempted." The *Vachris* decision has also been sharply criticized by other circuits as being "suspect", *see, e.g., McCoy v. Massachusetts Institute of Technology*, 950 F.2d 13, 20, n. 3 (1st Cir. 1991), *cert. denied*, 504 U.S. 910 (1992) and of "doubtful validity." *Local Union 598 Plumbers & Pipefitters Industry Journeymen & Apprentices Training Fund v. J.A. Jones Construction Co.*, 846 F.2d 1213, 1219 (9th Cir.), *aff'd*, 488 U.S. 881 (1988).

impact on the original 1974 ERISA provisions and those that impact upon the 1980 amendments, the Second Circuit held that the remedies provided by ERISA § 502(a) -- which "provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly" -- are exclusive. (Pet. App. 14a (quoting *Ingersoll-Rand*, 498 U.S. at 144).)

Petitioner's claim that several recent state cases are "inconsistent in principle with the Second Circuit decision" and demonstrate a "clear change in emphasis" is belied by an examination of these cases and the analyses applied.

Petitioner places great emphasis on the decision of the New Jersey Superior Court, Appellate Division, in *Board of Trustees of Operating Engineers Local 825 Fund Service Facilities v. First Indemnity of America Ins. Co.*, 287 N.J. Super. 498, 671 A.2d 596 (App. Div. 1996). Eight days before the filing of this Petition, however, the Supreme Court of New Jersey had the opportunity to affirm that decision and further clarify the basis for its finding that ERISA preempted the state law action brought against sureties to recover on payment and performance bonds issued under the New Jersey Public Works Bond Act, upon the contractors' failure to make contribution payments to various benefit funds. 148 N.J. 561, 691 A.2d 339 (1997). The New Jersey court distinguished the state action before it from the type of preemption situation presented to the Court today, where a state action to collect unpaid benefit contributions specifically targets benefit plans by directly referring to fringe benefits, health and welfare or pensions plans, conflicts with an ERISA enforcement mechanism, touches upon rights or duties incident to the ERISA plan, and conflicts with a cause of action under ERISA. The New Jersey court unabashedly acknowledged that a state statute which achieves any of the foregoing fundamentally differs from the ERISA-neutral and union-neutral Bond Act found by the Court not to be preempted by ERISA. 148 N.J. at 575-76.

The New Jersey court, in determining its finding to be in accord with this Court's decisions in *Travelers* and *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A.*, 117 S.Ct. 832 (1997), the Second Circuit's decision in *Greenblatt*

v. Delta Plumbing & Heating Corp., 68 F.3d 561 (2d Cir. 1995), and the Third Circuit's decision in *Ragan v. Tri-County Excavating*, 62 F.3d 501 (3d Cir. 1995), deemed it significant that the New Jersey Bond Act was a law of general applicability that functioned without any reference to ERISA, "ha[ving] existed in various forms for almost eighty years, long before Congress adopted ERISA." 148 N.J. at 576. Of additional import to the court was that the actions brought pursuant to the Bond Act do not "undermine the set of remedies ERISA provides to beneficiaries under its 'comprehensive civil enforcement scheme.'" *Id.* at 574-75 (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987).) BCL § 630, by contrast, requires the existence of an ERISA plan as an element of an action brought thereunder and imposes an obligation to make payments that ERISA imposes on someone else. (Pet. App. 35a-36a.) By doing so, the statute impermissibly expands and directly impacts upon remedies provided by ERISA, thus completely undermining the Congressional policy behind § 502(a) by allowing ERISA-plan beneficiaries "to obtain remedies under state law that Congress rejected in ERISA". (Pet. App. 9a-11a (quoting *Pilot Life*, 481 U.S. at 54).)[3]

Similarly, the Court of Appeals of Indiana in *Seaboard Surety Co. v. Indiana State District Council of Laborers and Hod Carriers Health and Welfare Fund*, 645 N.E.2d 1121 (Ind. Ct. App. 1995), held that a state common law action against a surety to collect delinquent fringe benefit contributions from its payment bond was not preempted by ERISA and, in so doing, addressed the same considerations factored into the Second Circuit's decision. The Indiana court, in rendering its decision without the aid of the *Travelers* analysis, found that the state law did not refer to benefit plans nor single them out for special treatment, and did not present an actual conflict with ERISA. *Id.* at 1127. It further determined, contrary to the finding of the Second Circuit, that the law did not "relate to" an ERISA plan since the bond requirement and remedy, which has

---

[3] In reaching its conclusion, the court in *Board of Trustees of Operating Engineers Local 825 Fund Service Facilities* did not deem the legislative history behind ERISA § 515 to be relevant to the preemption inquiry before the court.

existed since the nineteenth century, was a traditional exercise of state authority and that any affect on the plan itself was merely incidental. *Id.* Clearly, the determination in *Seaboard* does not in any way change the analysis applied or the result reached by the Second Circuit.

Placing principal reliance upon the Hawaii Supreme Court's decision in *Hawaii Laborers Trust Funds v. Maui Prince Hotel*, 81 Haw. 487, 918 P.2d 1143 (1996), which considered whether an action brought under the state Mechanic's and Materialman's Lien Law was preempted by ERISA, Petitioner erroneously argues once again that the legislative history of § 515 is of primary importance in considering the preemption issue. The Hawaii court, in determining that Hawaii's "neutral/general statute which was not enacted in relation to ERISA employee benefit plans" was not preempted by ERISA, distinguished those state statutes that single out ERISA employee welfare benefit plans from those statutes of general applicability that merely provide a remedy to collect on a judgment on behalf of a plan. *Id.* at 1152-53. The Second Circuit made that very same distinction in the case at bar when it held that a BCL § 630 action was not an action to collect a judgment but rather was a suit to collect directly from shareholders the delinquent contributions that the corporate employer had failed to pay. (Pet. App. 31a.) This distinction logically resulted in the Second Circuit's conclusion that ERISA conflicted with the civil enforcement provisions of ERISA § 502(a) because "ERISA § 502(a) already provides a means for collecting delinquent ERISA contributions from employers .... [and] does not impose upon the shareholders of the employer corporation the *employer's* statutory liability to make contributions." (Pet. App. 11a-12a, 32a-33a.)

Thus, an examination of the cases principally relied upon by Petitioner in support of his claim that the Second Circuit's decision is in conflict with the decisions of other courts confirms that Petitioner's quixotic distinction simply does not exist.[4]

---

[4] The Third Circuit's decision in *Ragan*, claimed by Petitioner to be a part of the "clear shift in emphasis", similarly concluded that the Union's action under a surety bond was not preempted by ERISA since it was not

(Footnote continued)

II.

WITH THE BENEFIT OF DILLINGHAM THE SECOND CIRCUIT'S DECISION WOULD REMAIN UNDISTURBED

In analyzing whether California's prevailing wage statute was preempted by ERISA, this Court sought to determine whether for purposes of ERISA § 514(a), the statute had a connection with or a reference to a covered employee benefit plan. *Dillingham,* 117 S.Ct. at 837. Contrary to the Second Circuit's decision at issue here, where it was determined that New York's BCL § 630 makes explicit reference to ERISA plans, significantly affects ERISA plans in a manner not so "tenuous, remote or peripheral", disserves the basic purpose of preemption in ERISA § 514, and falls within the scope of ERISA § 502(a) by providing to plans a remedy to enforce employer contributions which Congress could have provided for but elected not to, the statute at issue in *Dillingham* made no reference to ERISA plans, explicitly or otherwise, and had no connection with ERISA. 117 S.Ct. at 839-40.

In setting forth the liability for which it authorizes recovery, BCL § 630 *on its face* specifically refers to contributions payable under two types of plans maintained by an employer which are regulated by ERISA: employee welfare plans and employee pension plans. This Court has made clear that such reference, in and of itself, automatically requires a finding of preemption.[5] Indeed, BCL § 630 expressly provides that the ten largest shareholders of a corporation shall be personally liable for the corporation's delinquent contributions to ERISA plans. The very existence of liability owed

---

specifically designed to affect employee benefit plans, did not single out such plans for special treatment, nor was the cause of action predicated upon the existence of an ERISA plan. 62 F.3d at 511.

[5] *See District of Columbia v. Greater Washington Bd. of Trade,* 506 U.S. 125, 131 (1992) (specific reference in statute requiring that mandated coverage be measured by reference to employee's "existing health insurance coverage" which were welfare benefit plans regulated by ERISA); *Mackey v. Lanier Collection Agency & Service, Inc.,* 486 U.S. 825, 829 (1988) (state statute which exempted funds or benefits of an employee benefit plan or program preempted).

by an employer for delinquent contributions depends upon the existence and application of an ERISA plan.[6]

In contending that *Dillingham* is controlling and that the Second Circuit's analysis ran afoul of this Court's decision, Petitioner ignores the Second Circuit's holding that BCL § 630 *explicitly* (and, therefore, impermissibly) referenced ERISA plans in a significant way by providing for a remedy not provided for by Congress in its comprehensive set of remedies set forth in § 502 (a), thus altering the incentives for employers to create and maintain ERISA plans. As the Second Circuit stated: "Thus, while § 630 would be salutary for plans that suffer a loss by reason of an employer's failure to contribute, this benefit would be achieved at a cost because, for stockholders of companies subject to § 630, personal liability may be a factor that militates against creating ERISA plans in the first place." (Pet. App. 9a.)

Petitioner's assertion that application of the *Dillingham* analysis would alter the Second Circuit's decision further fails to consider that the California statute at issue, which regulated apprenticeship standards and the wages paid on state public works, was enacted before ERISA and dealt with matters traditionally subject to local regulation. 117 S.Ct. at 840-41. By contrast, BCL § 630 is not a generally applicable statute that makes no reference to, and functions irrespective of, the existence of an ERISA plan. (Pet. App. 35a.) Thus, the Second Circuit was not required, as Petitioner contends, to apply a "presumption against preemption" analysis, *Dillingham*, 117 S.Ct. at 841, since there was no "paucity of indication in ERISA", *id.*, that Congress could have preempted the remedy made available by § 630 but chose not to do so.[7]

---

[6] As in *Greater Washington*, the amount of recovery cannot be determined but for specific reference to the ERISA plans themselves.

[7] Moreover, where as here, causes of action have been brought pursuant to state laws authorizing the imposition of liability for the violation of rights guaranteed by ERISA, the Supreme Court has repeatedly found them to be preempted by ERISA's enforcement procedure. *See Ingersoll-Rand*, 498 U.S. 133 (state common law claim that an employee was unlawfully discharged to prevent his attainment of benefits under a plan covered by

(Footnote continued)

III.

THE SECOND CIRCUIT PROPERLY CONCLUDED THAT THE STATE LAW ACTION AT ISSUE FELL "WITHIN THE SCOPE" OF § 502(a) AND THAT REMOVAL WAS PROPER

The final basis upon which Petitioner seeks a writ of certiorari is predicated upon the Second Circuit's finding that the state law action falls "within the scope" of ERISA § 502(a) for purposes of complete preemption. Petitioner contends that the Second Circuit's determination was erroneous and that removal of the action to Federal Court was therefore improper. (Pet. at 18-20.)

Contrary to Petitioner's claim, however, the Second Circuit did not find the state law to be "within the scope" of § 502(a) merely based upon its observation that any "suit to collect ERISA contributions is very much of central concern to the federal statute." (Pet. at 19, Pet. App. 38a.) Rather, the Second Circuit, in denying Petitioner's request for rehearing, determined that the cause of action provided by BCL § 630 and being pursued by Petitioner fell squarely within this Court's conflict preemption doctrine, "under which the preemptive effect of § 502(a) is held to be 'so complete that an ERISA preemption defense provides a sufficient basis for removal of a cause of action to the federal forum.'" (Pet. App. 34a (quoting *Ingersoll-Rand*, 498 U.S. at 145).) Indeed, the Second Circuit found New York's BCL § 630 to be "just like the Texas cause of action at issue in *Ingersoll-Rand*, because the state statute '[u]nquestionably ... purports to provide a remedy for the violation of a right expressly guaranteed by [ERISA] and exclusively enforced by § 502(a)." *Id.*

Further, there is no merit to Petitioner's claim that this Court's decision in *Peacock v. Thomas*, 116 S.Ct. 862 (1996), presents an analogue to the situation before this Court. The basis for liability in *Peacock* was the state's veil-piercing doctrine, the state law being one of general applicability; the obligation imposed by § 630, by

---

ERISA preempted); *Pilot Life*, 481 U.S. 41, 47-48 (state common law contract and tort claims asserting improper processing of a claim for benefits under ERISA plan preempted).

contrast, "is the very obligation to make payments that ERISA requires, and the state law itself designates new ERISA obligors. Thus, the basis for Romney's liability is an obligation that ERISA imposes on someone else. Such a situation plainly constitutes complete 'conflict preemption' conferring federal jurisdiction under ERISA." (Pet. App. 35a-36a.)

In addressing the meaning of the "within the scope" requirement formalized by this Court in *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987), the Second Circuit acknowledged that Petitioner's action alleged an ERISA violation by the corporate employer, but was not brought against a party upon whom ERISA predicates liability. (Pet. App. 37a.) Yet, the Second Circuit noted that the violations of ERISA by the corporate employer were "ones for which the corporations' shareholders are expressly accountable by the state statute." (Pet. App. 34a.) Thus, of primary importance to the Second Circuit in determining that the cause of action alleged by Petitioner fell "within the scope" of ERISA, was the fact that "ERISA explicitly provided a cause of action for Romney, at least vis a vis the employer", and by imposing liability on shareholders that would not otherwise exist, plaintiffs would be afforded an additional enforcement mechanism to recover payments that the corporation was already obligated to provide. (Pet. App. 16a, 38a-39a.) According to the Second Circuit, the fact that an action is directed against a defendant not liable under ERISA does not prohibit a finding that such action is "within the scope" of § 502(a) where the action is to collect ERISA contributions -- which is of "central concern to the federal statute" -- and the party sued is in an ownership relationship to the party traditionally liable under ERISA. (Pet. App. 38a-39a.)

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

CHRISTOPHER J. SULLIVAN, ESQ.
Counsel of Record
HERRICK, FEINSTEIN LLP
Two Park Avenue
New York, New York 10016
(212) 592-1400
Attorneys for Respondent
Alan Lin

On the Brief:
MARA B. LEVIN, ESQ.